

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

PETER BIRKHOLZ,  
d/b/a BIRKHOLZ AND COMPANY,  
Plaintiff,

V.

PHILADELPHIA INDEMNITY  
INSURANCE COMPANY,  
Defendant.

C.A. No. 11-12264

## ORDER

WOLF, D.J.

March 21, 2013

This case was removed to this court from the Middlesex County Superior Court. Prior to a scheduling conference being conducted by this court, defendant Philadelphia Indemnity Insurance Company ("Philadelphia") filed a motion to dismiss two of the three counts of plaintiff Peter Birkholz's ("Birkholz") complaint. The motion was not opposed. The court found the motion to dismiss to be meritorious and dismissed those two counts.

Philadelphia subsequently filed a motion for summary judgment on the remaining count (the "Motion"). Birkholz filed an opposition arguing, in part, that the Motion is premature because no discovery has been conducted. Birkholz has not described with particularity the evidence he asserts would be developed in discovery. See Jones v. Secord, 684 F.3d 1, 6 (1st Cir. 2012). However, this court rarely authorizes the filing of

motions for summary judgment before discovery is completed, and it is not evident that it would be appropriate to decide the merits of the Motion on the present record.

Therefore, it is hereby ORDERED that:

1. Philadelphia's Motion for Summary Judgment (Docket No. 8) is DENIED without prejudice.

2. After conferring with Philadelphia, Birkholz shall, if necessary, by April 19, 2013, file an affidavit invoking Federal Rule of Civil Procedure 56(d) and addressing its requirements. See Jones, supra.

3. If necessary, Philadelphia shall respond to Birkholz's submission by May 3, 2013.

4. A scheduling conference, at which the Rule 56(d) issue, among others, will be addressed, shall be held on May 8, 2013, at 4:00 p.m. The parties shall comply with the attached Order concerning that conference.

  
UNITED STATES DISTRICT JUDGE